

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

GERALD BURKE and ETHELDA) NO. 61915-2-I
BURKE, husband and wife,)
)
Appellants,)
)
v.) UNPUBLISHED OPINION
)
PETER STEFFEN and "JANE DOE")
STEFFEN, husband and wife, and)
AMERICA'S BEST CHARTERS, LLC,)
d/b/a ABC YACHT SALES,)
)
Respondents.) FILED: July 27, 2009

BECKER, J. – The owner of a Prima yacht listed it for sale with a broker. The owner then bought a new yacht. In anticipation of the sale of the Prima, the parties signed documents characterizing the transaction as a trade-in so that the owner could avoid sales tax. When the Prima did not sell, the owner filed suit alleging that the broker had promised to pay him a fixed price for it. The trial court concluded after a bench trial that the note offered as evidence of this

purported promise was a forgery and refused to enforce it. Finding no error in the trial court's application of the law of contracts, agency, fraud, and attorney fees, we affirm.

The trial court's findings, the trial exhibits, and undisputed trial testimony reflect the following facts: Gerald Burke is a retired attorney who enjoyed boating. In 1988, he bought a 45-foot Prima yacht. Over time, a medical condition impaired his ability to enjoy the Prima. Burke became interested in buying a Trojan yacht, which better suited his physical limitations. He was approached by Robert Fiala, an independent contractor working on behalf of respondent America's Best Charters, LLC (ABC). Respondent Peter Steffen was the principal and chief executive officer of ABC. Fiala arranged a listing agreement granting ABC the exclusive right to sell the Prima.

Before agreeing to the deal, Burke wanted changes made to the proposed listing agreement. The changes reduced ABC's commission from 10 percent of the selling price to eight percent and added statements that (1) ABC would not incur any costs to maintain the Prima unless he approved them in advance; (2) in the event of a legal action, the venue would be King, rather than Skagit, County; (3) the Prima would not be moved to ABC's Seattle marina until Burke acquired a vessel to replace it; and (4) the parties would enter a trade-in

arrangement later. Fiala communicated Burke's proposed changes to Steffen. Steffen signed the listing agreement with the changes on October 28, 2004. The agreement required ABC to use its best efforts to sell the Prima. The listing price was set at \$225,000, but the agreement did not establish a fixed or minimum price for a sale.

In November 2004, Burke agreed to buy a Trojan yacht that Fiala found in San Diego.

On December 9, 2004, Steffen executed a note in favor of Burke promising that ABC would pay Burke \$175,000 when the Prima sold for no less than \$190,200. The note was expressly made subject to the sale of the Prima and its sale price:

This promissory note is subject to the sale of the above Vessel and its sale price. ABC Yacht Sales will receive 8% of the sale price for its services, whereby Gerald G. Burke will receive the remaining Dollar amount minus any closing costs. There is no time limit for the sale of the Vessel however ABC Yacht Sales will make every effort in the course of the customary sales practices to find a buyer for the Vessel.

The note further indicated that Peter Steffen executed the note as a principal, not a surety, and if a suit was brought to collect the note, Skagit County would be the venue. On December 14, Burke executed a bill of sale to ABC for the Prima, reciting that the consideration received was "Ten Dollars (\$10.00) and other valuable consideration."

By June 2006, despite some offers, ABC still had not sold the Prima. Burke wrote to ABC demanding that it pay him \$175,000 for the yacht. Later that month, Burke filed a complaint against ABC in King County Superior Court. ABC answered and asked for a change of venue to Skagit County, as was specified in the December 9, 2004 promissory note. Burke responded with a declaration denying that his claims were based on the December 9 promissory note. Burke claimed he had rejected that note and that Steffen had signed a different promissory note on December 13, 2004, designating King County as the venue in case of a dispute. Under the later note, Steffen had allegedly agreed unconditionally to pay Burke \$175,000 for the Prima by June 15, 2006. Burke, however, had only a photocopy of the December 13 note.

Steffen denied signing the December 13 note. He claimed he saw it for the first time when Burke attached it to his declaration in opposition to ABC's request for a change of venue.

The case remained in King County. Burke's claims—including conversion, consumer protection violations, and fraud—were dismissed on summary judgment, except for the claim that ABC owed him \$175,000 under the December 13, 2004 promissory note. The parties proceeded to a bench trial on that claim and on ABC's counterclaims for costs of maintenance of the yacht and

for the commission it would have earned if Burke had cooperated in selling the Prima.

Burke claimed at trial that he sold the Prima to ABC outright. As proof, he relied on the December 13 note and on the bill of sale dated December 14, 2004. ABC asserted that Steffen's signature on the December 13 note was a forgery. The trial court so found and consequently concluded that the terms of the December 13 note were unenforceable against the defendants. The court granted judgment in favor of the defendants on Burke's claims. The court also found the defendants' counterclaims to be unsupported. Burke was ordered to pay attorney fees and costs of more than \$95,000. Meanwhile, through a court-appointed receiver, the Prima was sold for \$135,000. This appeal followed.

The trial court did not decide who had forged Steffen's signature. On appeal Burke does not challenge the finding that it was forged. Burke contends, however, that notwithstanding the invalidity of the December 13 note, the court should have found that the bill of sale did transfer ownership of the Prima to ABC and should have required ABC to pay him \$175,000 for it because Fiala, acting as an agent of ABC, represented to Burke that the December 13 note had been properly signed by Steffen.

BILL OF SALE

The trial court found that the parties did not intend to use the bill of sale to actually transfer ownership of the Prima to ABC; rather, it was evidence that they intended to trade the Prima as part of the purchase price of the Trojan yacht. It was designed to insulate Burke from the obligation to pay sales tax on his purchase of the Trojan. The court noted evidence showing that after December 2004, Burke engaged in negotiations with other potential buyers of the Prima, and found this evidence inconsistent with Burke's assertion that he had already transferred ownership of the vessel.

Burke argues that the bill of sale unambiguously transferred his entire interest in the Prima yacht to ABC, and the trial court erred by relying on extrinsic evidence to find that the parties intended Burke to retain ownership after he executed the bill of sale in December 2004.

Burke did not sue to recover damages under the bill of sale. He sued to recover the fixed price of \$175,000 as specified by the forged note of December 13. The bill of sale does not contain any promises and does not identify any consideration above 10 dollars. Consequently, the relief Burke seeks—payment from ABC of \$175,000—would not follow solely from reversal of the trial court's finding that the bill of sale did not transfer ownership. He would also have to

succeed with his agency argument discussed below.

We reject Burke's argument that the bill of sale unambiguously transferred ownership of the Prima to ABC. The trial court's determinations with respect to the bill of sale correctly applied Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990) and Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 115 P.3d 262 (2005). Berg recognized that the intent of contracting parties is almost never plain except in the context of circumstances surrounding an instrument's execution. Therefore, extrinsic evidence regarding those circumstances and the acts and conduct of the parties subsequent to the contract's making may be admissible to determine the parties' intent. Hearst, 154 Wn.2d at 503-04.

The circumstances surrounding an agreement and other extrinsic evidence may be used to determine the meaning of specific words and terms in the agreement, but may not be used to vary or contradict the written words. Hearst, 154 Wn.2d at 503. Burke contends the trial court improperly allowed the unrestricted use of extrinsic evidence to contradict the plain written words of the bill of sale. The thrust of his argument is that the bill of sale should have been considered in isolation from other documents making up the transaction between the parties.

The trial court was not obliged under Berg and Hearst to look at the bill of sale in isolation from the other documents. Burke was claiming that Steffen promised unconditionally to pay him \$175,000 for the boat, as reflected in the forged December 13 note. Steffen was claiming that the December 9 note and the December 14 bill of sale were together intended to accommodate Burke's desire to avoid paying sales tax, such that the bill of sale did not actually transfer ownership. To evaluate these claims, the court necessarily considered evidence concerning the listing agreement and the December 9 note as well as the December 13 note and the December 14 bill of sale. See, e.g., Scott v. Wall, 55 Wn. App. 404, 777 P.2d 581 (1989). Burke makes a conclusory assertion that Scott predates and therefore contradicts the Berg line of cases, but we find it to be consistent with Berg and Hearst.

Burke also contends that a state statute, Coast Guard regulations, and other evidence support his argument that the parties intended the bill of sale to transfer ownership of the Prima. See RCW 88.02.125. Because the trial court's finding that they did not intend to transfer ownership is supported by substantial evidence and not legally erroneous, we reject this contention.

APPARENT AGENCY

At trial, Burke testified that he was under the impression, created by Fiala, that ABC was going to give him a promissory note promising to pay him \$175,000 for the Prima in 18 months if no one else bought it by then. He testified that Fiala delivered to him the promissory note of December 9, 2004, and he was concerned because it did not contain Steffen's agreement to pay him a fixed price. Burke said he called Fiala to say the December 9 note was not acceptable. He drafted a new note on December 13 containing Steffen's promise to pay \$175,000 by June 15, 2006. Burke testified that he delivered the new note to Fiala and that Fiala returned the next day to give him the new note with Steffen's signature. Fiala testified and denied any knowledge of the December 13 note.

The trial court found that Fiala was acting as an agent for ABC in connection with Burke's transactions, but that he did not have actual or apparent authority to bind ABC or Steffen to purchase the Prima for a fixed price. According to Burke, this finding by the trial court answered the wrong question. He says the real issue was whether Fiala had apparent authority to act for ABC when he led Burke to believe Steffen had actually signed the December 13 note.

An agent has apparent authority to act for a principal only if the principal made objective manifestations of the agent's authority toward a third person.

D.L.S. v. Maybin, 130 Wn. App. 94, 98, 121 P.3d 1210 (2005). The principal's actions must lead the one claiming apparent authority to believe that the agent has authority to act for the principal, and the principal's actions must be such that the claimant's belief is objectively reasonable. Hansen v. Horn Rapids O.R.V. Park, 85 Wn. App. 424, 430, 932 P.2d 724 (1997).

Burke did not have any direct contact with Steffen or anyone else at ABC. He dealt only with Fiala in negotiating the listing agreement and the December 9 promissory note and in delivering the bill of sale. Burke contends that even though the December 13 note turned out to be forged, Steffen was bound by its terms because Fiala delivered the note to him personally, indicating he had gotten it signed by Steffen. Burke contends Fiala had apparent authority to make this representation on behalf of Steffen in view of the fact that all of ABC's previous dealings with Burke were conducted through Fiala.

The trial court did not make any finding, written or oral, supporting this contention. In fact, the court rejected a written finding proposed by Burke stating that Burke understood from Fiala's representations that the December 13 note had been signed by Steffen.

The trial court did not find Fiala to be entirely credible, and the court did state orally that two witnesses for Burke were credible when they testified about

the delivery of the note. But these observations by the trial court do not compel us to accept as true the finding that Burke proposed, which the court rejected. Other than Burke's own testimony, there is no proof that Fiala led Burke to believe he had obtained Steffen's signature on the December 13 note.

The credibility of witnesses is for the trial court to determine. We are in no position to decide that Burke's version of the events of December 13-14, 2004 is true. Under the circumstances, the omission of findings establishing Burke's account of those events amounts to findings against Burke. Wallace Real Estate Investment, Inc. v. Groves, 72 Wn. App. 759, 773 n.9, 868 P.2d 149, aff'd 124 Wn.2d 881 (1994). Burke did not carry his burden of proving that Fiala did anything in connection with the December 13 note that would have reasonably led Burke to believe that Steffen had signed it.

FRAUD

Burke raised claims of fraud and fraud in the inducement that were dismissed on summary judgment. He assigns error to this ruling.

A claim of fraud is established by clear, cogent, and convincing evidence of all nine elements of fraud:

(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7)

plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Stiley v. Block, 130 Wn.2d 486, 504, 925 P.2d 194 (1996).

ABC asked the trial court to grant summary judgment on Burke's fraud claims because Burke's complaint did not state with particularity the facts supporting the claims. ABC argued that the only facts that Burke seemed to be relying on were ABC's representations through Fiala that it would market the Prima aggressively, and these were not actionable representations of existing facts. In response, Burke asserted that Fiala committed fraud by misrepresenting that (1) ABC had an experienced marketing division, (2) ABC regularly advertised in prominent boating magazines, (3) the Prima would benefit from ABC's experience and wide exposure, (4) ABC would take the Prima as a trade-in, (5) Burke would not pay any taxes on the transaction if he bought a Trojan through ABC, and (6) ABC agreed to the terms of the December 13 note. Burke argued that he would not have entered into the agreements or taken out a loan to pay for the Trojan absent Fiala's misrepresentations.

On appeal, Burke's argument has changed. The only link to the fraud claim that was argued below is Burke's continued insistence that ABC, through Fiala's delivery of the December 13 note, misrepresented that Steffen agreed to the terms of that note. He now argues that the identity of the person who signed

the December 13 note was a material issue of disputed fact that should have precluded summary judgment on his fraud claims. But he fails to identify any evidence in the record that was before the court at the time of summary judgment that would have proved who did sign the note. And he fails to explain why resolving that issue was material to his claim of fraud.

Burke asserts that the order of summary judgment “hamstrung” him from introducing evidence at trial concerning the alleged misrepresentation by Fiala. This argument is also without merit. Burke had every opportunity at trial to prove that Fiala, with authority to do so, promised that Steffen would pay him \$175,000 for the Prima or represented that Steffen had made such a promise. Burke simply failed to carry his burden of proof on this issue. He has cited no part of the record suggesting that he was precluded from presenting material evidence that would have changed the outcome of the trial.

The trial court did not err when it granted summary judgment on Burke’s fraud claims.

ATTORNEY FEES

The respondents request an award of fees and costs for this appeal. Burke sued for damages under the forged December 13 promissory note. That

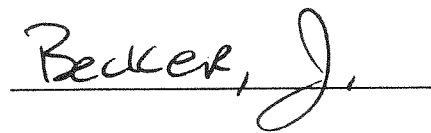
note included an attorney fees provision:

In case suit or action is commenced to collect this Note—or any portion thereof—the Obligors promises to pay, in addition to the costs provided by statute and the injured party's ancillary costs, such other sums as may be adjudged reasonable as attorney's fees. Any judgment entered hereon shall bear interest at the rate of twelve percent (12%) per annum.

Such an agreement is reciprocal. RCW 4.84.330. And attorney fees may be awarded to the prevailing party even if the contract itself is unenforceable.

Herzog Aluminum, Inc. v. General American Window Corp., 39 Wn. App. 188, 197, 692 P.2d 867 (1984). The respondents' request is granted.

Affirmed.

A handwritten signature in cursive script, reading "Becker, J.", is written over a horizontal line.

WE CONCUR:

Ajda, J.

Grosse, J